No. 03-1500

Supreme Court, U.S.
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In The Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY,
IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS AND CHAIRMAN, STATE PRESERVATION BOARD, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

AMICUS CURIAE BRIEF OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENTS

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Question Presented for Review

Whether a large monument, 6 feet high and 3 feet wide, presenting the Ten Commandments, located on government property on the walkway between the Texas State Capitol and the Texas Supreme Court, is an impermissible establishment of religion in violation of the First Amendment.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international non-profit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing free legal representation to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the Court in numerous First Amendment cases such as *Frazee v. Department of Employment Sec.*, 489 U.S. 829 (1989), *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666 (1998), *Good News Club v. Milford Central School District*, 533 U.S. 98 (2001), and *Owasso Indep. School District v. Falvo*, 534 U.S. 426 (2002). The Institute has also filed briefs as an *amicus* of the Court on many occasions. Institute attorneys regularly handle First Amendment cases that concern the interplay between the Establishment Clause and the Free Speech and Free Exercise Clauses. The Institute has published educational materials and taught courses in this area as well.

The Rutherford Institute supports the Respondents in this case because the Fifth Circuit's judgment and opinion recognize the important place the Ten Commandments occupies in the development of the law, both in this country and worldwide. Equally important, the Fifth Circuit's decision establishes as precedent that religious symbols

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[1] Counsel of record to the parties in this case have consented to the filing of an *amicus curiae* brief by The Rutherford Institute, and letters reflecting said consent have been filed with this Brief. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief. The Rutherford Institute expresses its gratitude for the research assistance provided by J. Charlton Wimberly.

need not be wholly purged from public life and may be recognized as an important part of our heritage.

STATEMENT OF THE CASE

This brief incorporates by reference the statement of facts contained in the principal brief of the Respondents.

SUMMARY OF ARGUMENT

The historic Ten Commandments monument, which has resided for forty-two years among the other historic monuments on the grounds of the Texas State Capitol, does not constitute a government endorsement of religion. The monument's context establishes that it is merely one of many commemorations of the history and culture of Texas. The Fifth Circuit's opinion makes this point clearly, and *Amicus* respectfully submits that this Court should affirm the Fifth Circuit's decision.

First, the mere presence on government property of a monument with religious themes is not a violation of the Establishment Clause. Such a monument only violates the United States Constitution if a reasonable observer would believe that the government endorses the monument's religious message. However, Petitioner seeks to do away with the endorsement test's reasonable observer standard and proposes a new "field of vision" test to take its place. Under Petitioner's proposed "field of vision" test, this Court's endorsement analysis would focus merely on what a viewer can see, rather than on what a reasonable observer, acquainted with the context and history of the monument and its forum, would know. Petitioner's proposed test has no basis in case law, and it should be rejected.

When analyzed under the proper reasonable observer standard, the presence of the Ten Commandments

Monument behind[2] the Texas State Capitol—one of seventeen monuments on the historic twenty-two acre capitol grounds—is not a government endorsement of religion. Rather, it is in the equivalent of a museum context, which negates government endorsement of the monument's religious message.

Second, the Fifth Circuit's decision is consistent with this Court's prior decisions on religious displays, as well as with the decisions of other Circuit Courts of Appeals concerning Ten Commandments monuments in or near government buildings.

Finally, the Establishment Clause mandates that government remain neutral between religion and non-religion. Petitioner requests that this Court abandon the reasonable observer standard and instead legalize the heckler's veto. This would result in the whitewashing of our nation's religious history and would fall far short of the neutrality required by the Establishment Clause.

Amicus respectfully submits that this Court should affirm the Fifth Circuit's decision.

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[2] Petitioner's Brief asserts that the Ten Commandments monument is located "directly in front of the Texas State Capitol." Br. for Pet'r at 30. However, the Fifth Circuit's opinion states that the Capitol Building's "main entry" is on its south side, while the Ten Commandments monument is located seventy-five feet away from the Capitol Building's *north* side. *Van Orden*, 351 F.3d at 176.

ARGUMENT

I. THE FIFTH CIRCUIT PROPERLY HELD THAT MAINTENANCE OF THE FORTY-TWO-YEAR-OLD TEN COMMANDMENTS MONUMENT AMONG SIXTEEN OTHER MONUMENTS ON THE HISTORIC GROUNDS OF THE TEXAS STATE CAPITOL DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE BY UNCONSTITUTIONALLY ENDORSING RELIGION.

A. Petitioner's Proposed "Field of Vision" Test—Which Directly Contradicts the Endorsement Analysis, Ignores the Reasonable Observer Standard, and Has No Basis in Case Law—Should Be Rejected.

Whether or not a display has the effect of endorsing religion depends upon whether a "reasonable observer" would consider the display to constitute a government endorsement of religion. *See County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 620 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (stating that, when considering a religious display, "the constitutionality of its effect must also be judged according to the standard of a 'reasonable observer'").

When applying the endorsement test, the reasonable observer is "deemed more informed than the casual passerby." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment). The "knowledge attributed to the reasonable observer" cannot "be limited to the information gleaned simply from viewing the challenged display." *Id.* at 780. Rather, the reasonable observer is deemed to be "aware of the history and context of the community and forum in which the religious display appears." *Id.*

Petitioner rejects the reasonable observer standard. While a substantial portion of Petitioner's Brief is devoted to the discussion of endorsement, nowhere does the brief attempt to define "reasonable observer" or discuss what facts a reasonable observer would know. Instead, Petitioner's Brief proposes a "field of vision" test, asserting that—when determining context for purposes of the endorsement test—"the appropriate focus must be on what the viewer of the Ten Commandments monument sees in looking at [the monument] and the area immediately around it." Br. for Pet'r at 35. This "field of vision" test is a major component of Petitioner's argument and is alluded to throughout Petitioner's Brief. *See, e.g.*, Br. for Pet'r at 3 ("[N]o other monument is visible from the Ten Commandments monument . . . ."); *id.* at 29 (noting that "no other monuments [are] visible when standing before" the Ten Commandments monument); *id.* at 33 ("No monument or display is next to, or even visible from, the Ten Commandments monument."); *id.* at 34 (suggesting that, in *Lynch v. Donnelly*, 465 U.S. 668 (1983), "all of the symbols [were] within the view of the observer"); *id.* at 35 (asserting that "the appropriate focus must be on what the viewer of the Ten Commandments monument sees"); *id.* at 36 (noting that, in *Allegheny*, "the viewer saw only the crèche and its floral frame").

Petitioner's proposed "field of vision" test is directly contradictory to the endorsement test. Whereas the endorsement test considers a reasonable observer with knowledge beyond what can be "gleaned simply from viewing" the monument, *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment), Petitioner's proposed test would *limit* analysis to what any single observer can "glean[] simply from viewing" the monument "and the area immediately around it." Br. for Pet'r at 35.

Not only does Petitioner's proposed "field of vision" test contradict the endorsement test, it also has no basis in case law. Petitioner's Brief ostensibly relies on *Lynch* and *Allegheny* for support, but neither case is consistent with the proposed test. *Lynch* never once discusses what is in the field of vision of a person looking at the crèche at issue in that case, and the statements to which Petitioner points in *Allegheny* are taken out of context to make them look as if they support Petitioner's proposed "field of vision" test. But rather than emphasizing what is in view when looking at a contested display, both cases underscore the importance of a display's overall context.

Petitioner's Brief interprets the *Allegheny* opinion as saying that this Court "declined the government's invitation to consider decorations throughout the building and in a nearby forum as part of the crèche display." Br. for Pet'r at 36. Petitioner's Brief then immediately infers that the "[c]ontext was restricted to what the viewer saw when observing the questioned display." *Id.* However, this inference is significantly off the mark. The portion of the *Allegheny* opinion cited to support this inference, and therefore purportedly supporting Petitioner's "field of vision" test, reads as follows:

> The presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the crèche. The record demonstrates clearly that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.

Allegheny, 492 U.S. at 598 n.48. This passage, which mentions nothing about what is in an observer's field of

vision, places emphasis entirely on the fact that the crèche was "distinct from any other decorations or exhibitions in the building." The fact that the other Christmas decorations were not visible from the crèche is unrelated to the Court's reason for not considering those other decorations. If this passage *were* endorsing the field of vision test, then the second sentence would be superfluous: whether or not the crèche was part of a larger exhibit would be irrelevant as long as other displays in the exhibit were not visible from the site of the crèche. But the passage as a whole makes clear that the other decorations were not considered in the endorsement analysis because they did not, along with the crèche at issue, comprise a unified exhibit and, therefore, were not part of a context which negated the crèche's endorsement effect.

The only portion of *Allegheny* which might be construed as supporting the "field of vision" argument is the following sentence from Part I.A of Justice Blackmun's opinion: "In addition, various departments and offices within the county courthouse had their own Christmas decorations, *but these also are not visible* from the Grand Staircase." *Allegheny*, 492 U.S. at 581 (emphasis added). However, this portion of the opinion was joined by only two other Justices, meaning that whatever inference might possibly be made from the statement cannot be attributed to a majority of the Court. Also, this sentence is immediately preceded by a discussion of the fact that the crèche on the Grand Staircase is "distinct and not connected with any exhibit in the gallery forum," a nearby part of the courthouse "used for art and other cultural exhibits." *Id.* Once again, the focus of the section taken as a whole is not on what could or could not be seen from the site of the crèche, but rather on the fact that the crèche in *Allegheny* was not part of a larger exhibit.

As explained in the following section, the Ten Commandments monument is part of a larger exhibit, as was the crèche at issue in *Lynch*. It is one of seventeen historic monuments on the capitol grounds, which "are designated as a National Historic Landmark that is dedicated to the display of 'statues, memorials, and commemorations of people, ideals and events that compose Texan identity.'" *Van Orden v. Perry*, 351 F.3d 173, 180 (5th Cir. 2003) (quoting H. Con. Res. 38, 77th Leg., R.S. (2001)).

B. A Reasonable Observer Would Recognize that the Ten Commandments Monument Is Being Displayed in the Equivalent of a Museum Setting, a Context that Negates Government Endorsement of the Monument's Religious Message.

"[I]n religious-symbols cases, context is the touchstone[.]" *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003) (alteration in original) (citation omitted). Context is important because it can "negate any message of endorsement of [a display's] content." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring); *accord Allegheny*, 492 U.S. at 595 (opinion of Blackmun, J., joined by Stevens, J.).

Petitioner's Brief displays a fundamental misunderstanding of how context operates in the endorsement analysis. For example, Petitioner's Brief asserts that "[i]f the State displayed a crèche in the manner and at the place where the Ten Commandments monument is located, its action would be unquestionably unconstitutional." Br. for Pet'r at 9. This argument makes no sense. By definition, context changes with situation. Since context is the touchstone in the endorsement analysis, then it does not follow that if a religious holiday decoration cannot be displayed in a location, then a historic monument cannot be displayed in that location either. Of course, a lone crèche could not be erected in place of the Ten

Commandments monument; a crèche in that location would not be part of a larger exhibit celebrating what has become a secular holiday and, therefore, would not be in a context that negates its effect of endorsing religion. However, a crèche *could* be placed in that location if it were part of a Christmas display, as in *Lynch*. Likewise, the Ten Commandments monument could not be placed among Christmas decorations in a government building; the Decalogue is not traditionally related with Christmas so the Christmas exhibit would not negate the Decalogue's religious message. However, the Ten Commandments monument *can* be displayed on the capitol grounds because it is part of a larger exhibit of seventeen historic monuments "commemorati[ng the] people, ideals and events that compose Texan identity[.]" *Van Orden*, 351 F.3d at 180 (quoting H. Con. Res. 38, 77th Leg., R.S. (2001)). The overall context created by this larger exhibit—a context of which the reasonable observer would certainly be aware—negates government endorsement of the monument's religious message.

Not only does Petitioner misunderstand context, Petitioner also fails to give the context of the Ten Commandments monument due consideration. In *Lynch*, this Court stated that the trial court had "plainly erred by focusing almost exclusively on the crèche" rather than viewing it "in the proper context of the Christmas Holiday season" and as part of a larger "display depict[ing] the historical origins of this traditional event long recognized as a National Holiday." *Lynch*, 465 U.S. at 680 (citations omitted). The trial court's mistake in *Lynch*—focusing exclusively on the crèche—is being repeated by Petitioner in this case. Petitioner's Brief focuses on the Ten Commandment's statue by itself, without considering the larger context of the Capitol grounds. *See, e.g.*, Br. of Pet'r at 9 ("The monument sits by itself . . . ."); *id.* at 29 ("The Ten

Commandments sits by itself . . . .); *id.* at 33 ("The Ten Commandments display sits on a corner by itself . . . .").

Context must be viewed from the perspective of a "reasonable observer" acquainted with "the history and context of the community and forum in which the religious display appears." *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment). In this case, the reasonable observer should be aware of the fact that the Ten Commandments monument is in the equivalent of a museum setting: it is one of seventeen monuments spread across the historic twenty-two acre Capitol grounds. The parties "stipulated that 'the Capitol, together with its grounds and the monuments erected and maintained there constituted a National Historic Landmark.'" *Van Orden*, 351 F.3d at 175. These grounds are maintained by the State Preservation Board, which qualifies as a museum under federal law, *id.* at 180 (citing 20 U.S.C. § 9172 (2003)), and the State employs a professional museum curator as Curator of the Capitol. *Id.* Also, the Visitor Services of the State publishes a written guide for walking tours of the grounds. *Id.* These are all facts concerning the "history and context of the community and forum," meaning that they are all facts of which the reasonable observer would be aware.

In *Lynch*, Justice O'Connor analogized the context of the crèche at issue there to "a typical museum setting." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). If the museum analogy is appropriate for a Christmas display in a public park, then it is certainly appropriate for a monument that is overseen with other monuments by a professional museum curator and a Board that is statutorily defined as a museum. Indeed, it would be difficult to conceive of a situation closer to a museum context without actually conceiving of a museum. This museum-like setting also "changes what viewers may fairly understand to be the

purpose of the display" by "negat[ing] any message of endorsement of that content." *Id.*

II. THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PREVIOUS DECISIONS CONCERNING RELIGIOUS DISPLAYS AND WITH DECISIONS BY OTHER CIRCUIT COURTS OF APPEALS CONCERNING THE CONSTITUTIONALITY OF TEN COMMANDMENTS MONUMENTS.

The Fifth Circuit's decision is consistent with previous decisions by both this Court and the other Circuit Courts of Appeals. In all of these decisions, context is the key. Yet, Petitioner consistently refuses to consider context when discussing how these cases relate to the case at hand.

Petitioner's Brief seeks to compare the Ten Commandments monument at issue here to the crèche display that was held unconstitutional in *Allegheny*, but the two displays have almost nothing in common. The crèche in *Allegheny* "occupied a substantial amount of space on the Grand Staircase," *Allegheny*, 492 U.S. at 580, which was the "'main,' 'most beautiful,' and 'most public' part of the courthouse." *Id.* at 579. In contrast, the Ten Commandments monument is located outside, seventy-five feet *behind* the Capitol Building. *Van Orden*, 351 F.3d at 176. The crèche in *Allegheny* had no historical significance, having been displayed in the courthouse for only five years when it became the subject of litigation. *Allegheny*, 492 U.S. at 579. The Ten Commandments monument, however, has been located in the same position behind the Capitol Building for more than forty-two years. *Van Orden*, 351 F.3d at 175. Finally, the crèche was "distinct and not connected with any exhibit," *Allegheny*, 492 U.S. at 581, whereas the Ten Commandments monument is part of a historical exhibit of seventeen monuments that spans twenty-two acres. *Van Orden*, 351 F.3d at 175. In short, there are almost no correlating facts between *Allegheny* and the instant case;

Petitioner can only draw comparisons between the two cases by ignoring the reasonable observer standard and by refusing to examine the context of the Ten Commandments monument. In actuality, the Ten Commandments monument is much more like the crèche display found constitutional in *Lynch*. "The *Lynch* display composed a series of figures and objects, each group of which had its own focal point" and was "a center of attention separate from the crèche." *Allegheny*, 492 U.S. at 598. As in *Lynch*, the Ten Commandments monument is merely one of seventeen "focal point[s]," a context which negates government endorsement of the monument's religious message.

Petitioner's Brief also places a great deal of emphasis on *Stone v. Graham*, 449 U.S. 39 (1980); *see, e.g.*, Br. of Pet'r at 8, 10-11, 23, 25, 27, 33, 41-42. *Stone*, which struck down a state statute requiring posting of the Ten Commandments in public schools, is easily distinguished. First, the *Stone* Court recognized that the Ten Commandments could be disseminated and discussed in public schools in some contexts: "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. Posting of religious texts on the wall serves no such educational function." *Stone*, 449 U.S. at 42 (citation omitted). Maintaining, in a museum-like setting, a monument donated by a private group is a far cry from the mandatory posting of the Ten Commandments in every public school. A state could not mandate that a painting of the Virgin Mary holding baby Jesus be displayed on the wall of every public school, but that does not mean that such a painting is banned from all government property. In fact, many such paintings are hanging in the National Gallery of Art. Second, the Establishment Clause is applied differently in a public school setting than it is in

other contexts. This Court has noted its "particular[] vigilan[ce] in monitoring compliance with the Establishment Clause in elementary and secondary schools" because of the "great authority and coercive power" that the government exerts due to "mandatory attendance requirements" and to "the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987) (citations and footnote omitted). The present context presents none of these problems.

Finally, the Fifth Circuit's decision is also consistent with decisions by other Circuit Courts of Appeals concerning Ten Commandments monuments in or near government buildings. Such monuments have been found unconstitutional when they are relatively new, *see Am. Civil Liberties Union v. McCreary County*, 354 F.3d 438, 441 (6th Cir. 2003) (display erected in 1999); *Glassroth v. Moore*, 335 F.3d 1282, 1286 (11th Cir. 2003) (monument installed in 2001), and when they are located in a prominent position and are not part of a larger exhibit. *See McCreary*, 354 F.3d at 441 (framed copy of Ten Commandments was displayed inside the County Courthouse and "was not part of any larger . . . exhibit"); *Glassroth*, 335 F.3d at 1284 (two-and-one-half ton monument of the Ten Commandments was erected "as the centerpiece of the rotunda in the Alabama State Judicial Building" and was purposefully left by itself so as not to "diminish" "the revealed law of God"); *Books v. City of Elkhart*, 235 F.3d 292, 306 (7th Cir. 2000) (Ten Commandments monument was located on front lawn of City's Municipal Building and could not "be fairly characterized as a component of a comprehensive display of . . . cultural heritage").

However, the Ten Commandments monument at issue here possesses none of these traits: it is forty-two-years old, it is located seventy-five feet *behind* the Capitol

(rather than in the Rotunda or near the main entrance), and it is part of a larger exhibit of seventeen historic monuments that, along with the Capitol grounds, comprise a National Historic Landmark. *Van Orden*, 351 F.3d at 175. It is, therefore, more similar to the displays at issue in *Modrovich v. Allegheny County*, 385 F.3d 397, 399 (3d Cir. 2004) (finding constitutional a Ten Commandments plaque displayed on the side of the Allegheny Courthouse since 1918, that has not been "highlighted or displayed prominently, and is one of several historical relics displayed on the courthouse"), and *Freethought Society v. Chester County*, 334 F.3d 247, 249-50 (3d Cir. 2003) (finding constitutional a Ten Commandments plaque displayed on the side of the Chester County Courthouse since 1920).

When viewed in context, this case resembles cases like *Lynch*: it is a historic display, not located in a position of prominence, that is part of a larger context which negates government endorsement of the display's religious message.

III. Acceptance of Petitioner's Proposed "Field of Vision" Rule Would Result in the Whitewashing of our Nation's Religious History and Fall Far Short of the Neutrality Between Religion and Non-Religion Mandated by the Establishment Clause.

The Fifth Circuit correctly held that the Establishment Clause's "guiding principle is government neutrality toward religion in the sense that a state cannot favor religion over non-religion or one religion over another." *Van Orden*, 351 F.3d at 178. This neutrality principle has been set forth by this Court on multiple occasions. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *see also Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 382 (1985) (noting that this Court has

"consistently recognized" a requirement that "the government . . . maintain a course of neutrality among religions, and between religion and nonreligion"); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("Th[e] [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.").

It is as much a violation of the Establishment Clause for the government to favor non-religion as it is for the government to favor religion. That is why this Court has noted that "'[T]he Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Lynch*, 465 U.S. at 672 (citations omitted).

The endorsement test, with its objective "reasonable observer" standard, was created to avoid this "callous indifference" and "hostility toward" religion.[3] As the Fifth

[3] Justice O'Connor made this clear in *Capitol Square*: "[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe. Indeed, to avoid 'entirely sweep[ing] away all government recognition and acknowledgment of the role of religion in the lives of our citizens,' our Establishment Clause jurisprudence must seek to identify the point at which the government becomes responsible, whether due to favoritism toward or disregard for the evident effect of religious speech, for the injection of religion into the political life of the citizenry. I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge. Under such an approach, a religious display is necessarily precluded so long as some passersby would perceive a governmental endorsement thereof. . . .

It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the

Circuit noted, the "reasonable observer standard attempts to capture the 'concern with the political community writ large'" rather than the concern of "the uninformed, the casual passerby, the heckler, or . . . a single individual." *Van Orden*, 351 F.3d at 178 (quoting *Capitol Square*, 515 U.S. at 779) (O'Connor, J., concurring in part and concurring in judgment). However, Petitioner rejects the entire reasonable observer construct. The new test proposed by Petitioner would require removal from government property of all things religious to which any passerby objects. In other words, Petitioner is seeking to legalize the "heckler's veto of the unreasonable or ill-informed" of which the Fifth Circuit warned. *Van Orden*, 351 F.3d at 182.

Doing away with the reasonable observer standard, as Petitioner requests, would essentially whitewash our nation's religious history by "entirely sweep[ing] away all government recognition and acknowledgment of the role of religion in the lives of our citizens." *Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment). As the Third Circuit recently concluded:

> Given our national interest in historical preservation, we believe we would set a dangerous precedent if we were to hold that any relic containing a religious message should be removed merely because "*any* person . . . could find an endorsement of religion" or "*some* people may be offended" by it. Our country's history is steeped in religious traditions. The fact that government buildings continue to preserve

community and forum in which the religious display appears." 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in the judgment) (quoting *Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring in part and concurring in the judgment)) (other citations omitted).

> artifacts of that history does not mean that they necessarily support or endorse the particular messages contained in those artifacts.

Modrovich, 385 F.3d at 410-11 (quoting *Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment)).

This Court has long recognized the role that religion has played in our nation's history, *see, e.g., Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963) ("[R]eligion has been closely identified with our history and government . . ."); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) ("The history of man is inseparable from the history of religion."), and has stated that "[a] secular state . . . is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed." *Allegheny*, 492 U.S. at 610. The wiping out of all public references to religion is entirely inconsistent with the Establishment Clause's mandate that government exhibit "neutrality between . . . religion and nonreligion." *Epperson*, 393 U.S. at 103-04. And such whitewashing of our country's religious history will take us dangerously close to an effective endorsement of atheism as our nation's official creed.

CONCLUSION

The historic Ten Commandments monument, which has resided for forty-two years among the other historic monuments on the Capitol grounds, does not constitute a government endorsement of religion. The monument's context establishes that it is merely one of many commemorations of the history and culture of Texas. The Fifth Circuit's opinion makes this point clearly, and *Amicus* respectfully submits that this Court should affirm the Fifth

Circuit's decision and reject Petitioner's proposed "field of vision" test, which would "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens."

Respectfully Submitted,

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